California Magistrate Finds BLM Fracking Leases Violate NEPA

Jeremy Brown April 15, 2013

Oil and gas producers have tagged California as the next great fracking frontier. The state has a storied history in the energy sector and remains the fourth largest oil producer in the country, with pumpjacks still scattered around Los Angeles and even hidden within a luxury shopping mall.

Its Monterey Shale formation is estimated to contain more than 15 billion barrels of oil – about 64 percent of national shale oil reserves and enough to inspire some optimists to speculate about a new gold rush.

Compared to other oil-producing states like Texas and North Dakota, however, California has a conflicted relationship with fossil fuels and their production. And as the state circulates a discussion draft of proposed fracking regulations, a federal magistrate judge in San Jose has decided one of the first of what will probably become an endless stream of National Environmental Policy Act (NEPA) challenges to unconventional drilling.

In a lawsuit brought by the Center for Biological Diversity and Sierra Club, the judge found that the Bureau of Land Management (BLM) had failed to consider the environmental impacts of mineral leases when it relied upon a years-old programmatic environmental impact study (EIS) that predated innovations in fracking and horizontal drilling.

As the court explained, the BLM follows a three-step decision-making process when it grants access to public lands for oil and gas development. First, it must prepare a Resource Management Plan (RMP) for the general area. Second, it leases specific parcels. Third, lessees submit applications for permits to drill.

In 2007, BLM adopted an RMP/EIS for an area spread across twelve counties in central California. The RMP/EIS projected that no more than 15 wills would be drilled within the next 15 to 20 years. It based the projection on historical drilling activities and concluded "[t]his trend is not likely to change much."

In 2011, BLM decided to sell oil and gas leases on a 2,700-acre portion of the RMP/EIS area and conducted an Environmental Assessment (EA). The EA assumed no more than one exploratory well would actually be drilled under the leases. This assumption was grounded in the half-decade old RMP/EIS – which was completed before the Fracking Revolution made extracting shale reserves economically feasible.

From the EA, the BLM concluded that selling leases would not have significant environmental impacts and issued a Finding of No Significant Impact (FONSI) rather than a new lease-specific EIS.

The plaintiff environmental nonprofits argued that the EA was insufficient and that the agency should have conducted an EIS that took into account the potential impacts of fracking. BLM countered that, under the leases, it reserved certain rights to deny drilling permit applications.

The court concluded that the reserved rights were not absolute and that the plaintiffs were correct: the agency should have considered the potentially significant environmental impacts of selling the leases.

And while NEPA typically allows an agency to tier off of a higher-level programmatic EIS, the RMP/EIS in this particular instance was inadequate because it did not reckon with the reasonably foreseeable consequences of fracking.

"[E]vidence shows that in just the past few years fracking has been combined with horizontal drilling and other modern technologies to provide access to previously unattainable shale oil such as that in the four parcels of Monterey shale at issue… Certainly, there was significant increased interest in oil and gas drilling in the Monterey shale, which is what lead to the 2012 sale."

While the decision does not mark the first time that fracking has implicated NEPA, it could serve as a precedent as fracking expands into states like California and Alaska with substantial federally held lands and as the BLM promulgates new fracking regulations.

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